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No. 09-308

Supreme Court, U.S.
FILED
OCT 13 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

U-HAUL CO. OF CALIFORNIA,

Petitioner,

v.

CITY OF BERKELEY, CITY COUNCIL OF THE CITY OF BERKELEY, LINDA MAIO, DARRYL MOORE, MAXWELL ANDERSON, DONA SPRING, LAURIE CAPITELLI, BETTY OLDS, KRISS WORTHINGTON, and GORDON WOZNIAK,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Three

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 15, Respondents City of Berkeley, City Council of the City of Berkeley, Linda Maio, Darryl Moore, Maxwell Anderson, Dona Spring, Betty Olds, Laurie Capitelli, Kriss Worthington and Gordon Wozniak (collectively referred to hereafter as "City") file this brief in opposition to the petition for writ of certiorari (hereafter "Petition") by U-Haul Company of California (hereafter "U-Haul"). The City will explain that the Petition simply does not meet the threshold requirements for invoking Supreme Court jurisdiction on certiorari since no federal question was decided by the California Appellate Court. *Not once* in its many briefs submitted to the Superior, Appellate or California Supreme courts did U-Haul ever reference any portion of the federal constitution. Accordingly, *none* of these courts ruled upon a federal constitution question. (See Appendices A, B and E to the Petition.)[1] Additionally, the federal issue U-Haul claims needs resolution was resolved by this Court in 1998.

The City will further point out that, even if the Court determines a federal question was actually raised and ruled upon, U-Haul's claim that its federal substantive due process right were violated fails as

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[1] All further references to Appendices A-C and E are to those included in the Petition. However, since U-Haul attached a resolution *not adopted* by the City Council as Appendix D, the City is required to attach the resolution in fact adopted by the City Council, Resolution Number 63,842, as Appendix A. The City will refer to this Appendix as "City's Appendix A."

well. U-Haul cites no law supporting its contention that it is entitled to violate its Conditional Use Permit (hereafter "CUP") *ad infinitum* and, as long as there is some other "lesser" remedy *available*, the City is forever prohibited from revoking it. Rather, the salient question before a public agency is whether such alternative remedies are *adequate* to protect the public welfare.

The record in this case establishes that, for over a decade, the community surrounding U-Haul's Berkeley location suffered due to its persistent refusal to comply with the unambiguous conditions of its CUP. These conditions reasonably limited U-Haul to storing 20 trucks on its lot and prohibited it from expanding its business into the public streets. Nonetheless, U-Haul packed its lot with trucks and the overflow converted the surrounding neighborhood into a U-Haul parking lot. The community had to endure the continual presence of U-Haul trucks monopolizing street parking and blocking driveways, fire hydrants, crosswalks, red and yellow zones and wheelchair ramps. Some residents also complained of cars being damaged by U-Haul trucks, that trucks were driven recklessly, and that trucks were serviced by U-Haul employees in the neighborhood.

Repeated requests by the City resulted only in multiple broken promises from U-Haul to alter its practices. When the City began its enforcement process, U-Haul claimed it was never subject to the 20 truck limitation and nothing prohibited it from using the streets as an adjunct parking lot. U-Haul later disavowed these defenses before the City

Council, when its representative stated that it had been aware of these limitations, did not dispute their application and admitted it had violated them and failed to legalize its operations. Ultimately, although the City Council believed that U-Haul might have been an asset to Berkeley had it acted legally, in the face of the uncontroverted record, it concluded that it had no choice but to revoke U-Haul's CUP.

U-Haul claims that it is seeking review to answer the question "[w]hether substantive due process review requires a consideration of the imposition of less drastic remedies in the case of permit revocation." Although no case stands for the proposition that a substantive due process violation arises from a mere failure to consider less drastic remedies, even if this were the standard, the record overwhelmingly establishes that the City did just that. Therefore, while it does not state it plainly, U-Haul is not actually complaining about the City's alleged failure to "consider" alternative remedies, but about the City's failure to "pursue" or "adopt" alternative remedies. (Petition at 23.)

Thus, U-Haul's Petition should be denied both on jurisdictional and substantive grounds.

STATEMENT OF THE CASE

Shortly after U-Haul was issued a CUP to operate a truck rental center in Berkeley in 1975, U-Haul's "use of public areas adjacent to [its]

property for conducting the company's business operations" created tension between itself and its neighbors. (Appendix A at 20a.) Repeating an allegation rejected by the Appellate Court, U-Haul claims without any support that it operated its facility "for over twenty years without significant incident or complaint." (Petition at 3.) However, testimony submitted by neighbors describes U-Haul violating its CUP as early as 1982 and repeatedly since then. (Administrative Record (hereafter "AR") 120, 128.) Additionally, the City's Hearing Officer described testimony she received which "confirm[ed] a history, dating back to 1975, of tension between U-Haul and its neighbors over the parking of rental [vehicles] on the streets . . . " (AR 99.)

Specifically, the neighbors had to endure U-Haul "consistently parking as many as 30 of its vehicles on the neighborhood streets . . . sometimes blocking cross walks and fire hydrants" and "employees . . . storing or servicing its vehicles or even driving them recklessly on the adjacent public streets." (Appendix A at 20a-21a.)

Once the City was made aware of the detrimental impact on the neighborhood, it repeatedly notified U-Haul over the course of a decade (in 1997, 2000, 2004, 2006 and 2007) that its actions were in violation of the following conditions of its CUP: 1) limiting it to storing 20 trucks and 30 trailers on its lot; 2) limiting its operations, including storage and staging of its equipment, to its property only; and 3) prohibiting its operations from creating persistent

complaints of detriment to the neighborhood. (*Id.* at 2a-3a and 20a-21a.) The City continually warned U-Haul that violations of this nature could lead to revocation and/or citations. (*Id.*) In fact, as the Appellate Court noted, the potential for revocation due to these types of violations was set forth on the face of U-Haul's CUP itself.[2]

In response to these notifications and warnings, U-Haul repeatedly promised to alter its practices in order to comply with its CUP, but "there is no evidence that [it] in fact implemented each of the proposed corrective measures." (*Id.*)

Amazingly, U-Haul claims "[i]n 2006 and 2007, at the direction of City staff, [it] applied for a use permit modification to increase the number of trucks allowed, decrease the number of trailers allowed, and to include spaces for overflow trucks." (Petition at 3.) In reality, U-Haul submitted a one-page fax purportedly seeking to modify its CUP in 2006. (AR 11, 66-67.) However, it did not include the requisite fees, applicant statement, site photographs, vicinity map, site plan or Zoning Use questionnaire. (AR 66-67.) The City notified it of the deficiencies and gave it ten days to resubmit. (AR 69-70.) U-Haul never did so. (AR 11.)

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[2] "Relevant here, the use permit set forth as a special condition that 'the use permit shall be subject to review, attaching of additional conditions, or revocation if persistent complaints are received that the operation is detrimental to the neighborhood.'." (*Id.* at 2a-3a.)

In 2007, U-Haul submitted another application. (AR 72-80.) Once again, the application was substantially incomplete and the City notified U-Haul. (AR 82-84.) Specifically, the City found that the site plan did not represent a realistic configuration that could accommodate the proposed number of trucks and trailers, plus employee and customer parking. (AR 82.) Yet again, U-Haul did not respond. (AR 11.)

As late as 2006, the City agreed to a 30 day moratorium on enforcement on the basis of U-Haul's pledge to bring its operations into compliance with its CUP. (*Id.* at 22a.) U-Haul failed to do so and, when the City resumed enforcement efforts after its expiration, there were "at least 24 incidents of [U-Haul's] use of the adjacent streets for parking its vehicles" and "[o]n four occasions, between 29 and 39 trucks parked on the streets." (*Id.* at 5a.)

Since U-Haul had proved impervious to the City's enforcement efforts and since it failed to adhere to any of its multiple promises to reform, the City was forced to begin the revocation process. Contrary to U-Haul's claim that the City's Zoning Adjustments Board (ZAB) "commissioned a staff report regarding U-Haul's business operations"[3], Code Enforcement staff initiated the revocation process by presenting their recommendation to the ZAB based upon their inability to gain compliance from U-Haul despite a

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[3] Petition at 4.

decade worth of effort. In particular, the staff recommendation states:

> [T]he evidence to date shows that U-Haul has consistently operated in a manner that requires it to store far more than the number of trucks permitted by Use Permit 7575, with the result that its operation has spilled out onto the street, thereby causing detriment to nearby residents. In staff's view, it is clear from the documents associated with the 1975 approval . . . that this level of detriment was neither contemplated nor approved at the time.

(AR 14.)

A public hearing was held before the ZAB to consider "whether the U-Haul business at 2100 San Pablo Avenue is in violation of Use Permit #7575 under BMC 23B.60.020[4] and, if so, the appropriate remedy" in 2007. (AR 7.) U-Haul did not appear or submit any response to the staff's allegations of CUP violations and ZAB recommended that the City Council revoke its CUP. (Appendix A at 5a-6a.)

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[4] As both the Superior and Appellate Court noted Berkeley Municipal Code (BMC) Section 23B.60.020 allows the City Council to "revoke a use permit if it finds that either (1) the holder of the permit has failed to comply with one or more of the conditions set forth therein; or (2) the permitted use has been substantially expanded or changed in character beyond that set forth in the permit." (Appendix A at 15a.)

At the subsequent City Council public hearing, U-Haul's District Vice-President "acknowledged and apologized for [U-Haul's] repeated violations of its use permit, and for its failure to implement steps to correct them in a timely fashion." (*Id.* at 6a.) In the face of the uncontroverted record, the City revoked U-Haul's CUP finding that U-Haul's "apology . . . does not negate its serious violations of Use Permit 7575 and is insufficient in light of the evidence which shows [U-Haul's] longstanding failure to comply with the use permit." (Appendix A at 6a citing City's Appendix A at 14.)

U-Haul implies that its "counsel proposed less drastic measures" *prior* to the City's vote to revoke at the public hearing. (Petition at 6.) However, U-Haul's counsel *did not appear* at the public hearing at all. Rather, *after* the public hearing was closed, he submitted materials and was allowed to argue on his client's behalf, despite the Council's rules, and despite no notice to the complaining neighbors. (AR 427-492, 509-510.) The Council specifically stated in Resolution Number 63,842 that U-Haul's counsel's submittal was provided "after the Council had closed the public hearing" and it was, therefore, "untimely" and "not admitted into the record." (City's Appendix A at 11 and 14.)

Despite this, the Council *did* consider U-Haul's counsel's submittal and presentation, but rejected it stating "there can be no estoppel as the City has never made any representations to U-Haul that its conduct was lawful and has in fact for numerous

years placed U-Haul on notice that it is in violation of the conditions of its use permit." (*Id.* at 12.)

U-Haul then filed a complaint and petition for writ seeking to overturn the revocation. (Appendix A at 6a.) After exercising its independent judgment, the Alameda County Superior Court denied the petition finding the weight of evidence supported the City's determination to revoke the CUP for violations of its conditions. (Appendix B.)

U-Haul then voluntarily dismissed the entire action without prejudice and appealed from that dismissal.[5] (Appendix A at 7a.) In an unpublished, unanimous decision, the California Appellate Court for the First Appellate District upheld the trial court's determination on all bases. (*Id.* at 10a.) Specifically, the Appellate Court determined that the "City was authorized under both California common law and BMC Section 23B.60.020 to revoke appellant's use permit." (*Id.* at 23a.)

U-Haul then petitioned the California Supreme Court for review of the following issue only[6]: "[w]hat

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[5] U-Haul blithely continued to operate at the Berkeley location and the City was forced to file a separate action to enjoin its operations, in which the court granted a preliminary injunction. (Alameda County Superior Court Case No. RG0838856.)

[6] California Rule of Court 8.504(b)(1) requires that a petition for review include a "statement of the issues presented for review. . . ." Thus, review is limited to those issues presented for

(Continued on following page)

is the appropriate standard of review that a government body must meet to revoke a use permit under which a business has a vested property right?" (U-Haul's Petition for Review to California Supreme Court at 1.) (hereafter "Petition for Review.") The California Supreme Court denied the petition for review on June 10, 2009. (Appendix E.)

ARGUMENT OR REASON FOR DENYING THE PETITION

I. The Petition Fails To Meet The Threshold Requirements For Invoking This Court's Jurisdiction On Certiorari

Supreme Court Rule 10 provides that certiorari is entirely discretionary and will be granted only for "compelling reasons." The Rule enumerates the criteria that the Court will consider in evaluating a Petition for Writ of Certiorari. U-Haul completely fails to address how its Petition presents a compelling basis for certiorari within the ambit Rule 10.

Since U-Haul does not mention which criterion it seeks certiorari under, the City presumes it to be either subsection (b) or (c), as these provisions relate to state court rulings. Subdivision (b) states: "a state court of last resort has decided an important federal

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review by the petitioner unless the court orders review on its own motion pursuant to California Rule of Court 8.512(c).

question in a way that conflicts with another state court of last resort or of a United States court of appeals." Subdivision (c) states "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this court or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Neither provision is applicable here because: (1) as the lack of a certificate declaring that a federal question was decided highlights, the Appellate Court did not decide *any* "federal question" let alone an "important federal question"; and (2) the "important federal question" U-Haul claims requires "resolution and guidance from this Court"[7] *was, in fact, settled* by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

A. In Considering Whether Revocation Was An Appropriate Remedy For U-Haul's Use Permit Violations, The Appellate Court Based Its Decision Solely On California Law

U-Haul complains that its right to substantive due process under the Fourteenth Amendment of the United States Constitution was violated by the City's decision to revoke its CUP for its Berkeley location. (Petition at 22.) However, U-Haul did not raise a federal claim before the California courts. *Not once* in

[7] Petition at 2.

any of its briefs before the Superior, Appellate or California Supreme Courts did U-Haul cite to or rely upon the federal constitution. Hence, none of these courts ruled upon a federal substantive due process claim. (See Appendices A, B and E.)

Indeed, U-Haul failed to formulate its challenge to the City's choice of remedies as a federal substantive due process violation until *this Petition*. Rather, before the Superior Court, U-Haul's challenge to the City's choice of the revocation remedy was stated in the following terms "Berkeley Municipal Code § 23B.60.020(B) Does Not Apply to a Vested Operation" and it argued that "*under California law*" "vested operations have a right to expand and change their operations in response to changes in demand. . . ." (Clerk's Transcript at 169-170.) (emphasis added.)

Before the Appellate Court, U-Haul repeated this challenge in the following terms: "[t]he record as a whole indicates that the revocation is unjustified" and, citing *California law alone*, argues "[a]s a whole, the record fails to rise to the level of a compelling public necessity to justify the interference with a vested right to continue business operations and a remedy as draconian as revoking the permit." (U-Haul Opening Brief on Appeal at 23-26.) Moreover, in its Reply Brief on this point U-Haul asserts: "[i]t should – and *under California law*, does – take more than a few minor citations from a limited time period to justify [revocation]." (U-Haul Reply Brief on Appeal at 13.) (emphasis added.)

Finally, before the California Supreme Court, U-Haul alleged "decisions rendered in *California courts* have explicitly applied the heightened standard to the state's 'interference with a constitutional right to carry on a lawful business'." (Petition for Review at 1 citing *O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151 (1971).) (emphasis added.) The result is that no court in this controversy ruled on a federal claim. (See Appendices A, B and E.)

This Court has held in *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) "[w]ith very rare exceptions, we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."

In particular, in *Bowe v. Scott*, 233 U.S. 658, 665 (1914), this Court held that an argument referencing "due process of law" which "mak[es] no reference to the Constitution of the United States and assert[s] no express rights thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." The ruling in *Bowe v. Scott* was recently followed in *Adams v. Robertson*, 520 U.S. 83, 89 (1997), which held "the passing invocations of 'due process' . . . fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution . . . and thus they did not meet our minimal requirement that it must be clear that a

federal claim was presented." As is true with Virginia and Alabama, California's Constitution also includes a due process clause[8] and U-Haul's failure to refer to the federal constitution in *any* of its papers, coupled with its sole reliance upon California law, undoubtedly demonstrates a lack of a federal question.

Indeed, U-Haul *admits* this lack of jurisdiction in its Petition by stating "the [trial] court did not address U-Haul's constitutional contentions whatsoever." (Petition at 7.) However, it claims that, because it cited a California appellate case (*Korean Am. Legal Found. v. City of Los Angeles*, 23 Cal.App.4th 376 (1994)), in support of an argument[9] before the trial court, and this California case, in turn, cited a federal case (*Lawton v. Steele,* 152 U.S. 133 (1894)), a federal question was sufficiently raised in order to vest this Court with jurisdiction. (*Id.* at 6-7.) This is obviously insufficient to raise an "important federal question" for purposes of a grant of certiorari.

Continuing in its effort to rewrite the state controversy as a federal question, U-Haul goes so far as to *insert* a reference to the *Lawton* holding *into a quote* from the Appellate Court's decision. (Petition at 8.) In reality, however, because U-Haul failed to raise any federal question before the Superior or Appellate

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[8] California Const., Art. I § 7(a) states "[a] person may not be deprived of life, liberty, or property without due process of law."

[9] Clerk's Transcript at 169-170.

Court, the Appellate Court relied upon *only Korean American, supra*, and *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776 (1948), to support its holding that the City properly revoked its CUP because the permit conditions were repeatedly and substantially violated. (Appendix A at 17a-18a.)

Ignoring Rule 10, U-Haul claims very generally that its Petition is subject to a grant of certiorari pursuant to 28 U.S.C. § 1257(a).[10] This Section states that this Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

However, as set forth in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), a "federal question [must be] raised, preserved, or passed upon in the state courts below" before this Court is vested with jurisdiction. The Court explained:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act

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[10] Petition at 1.

> of 1789 . . . vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, *Miller v. Nicholls*, 4 Wheat. 311, 315 (1819), and since, e. g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Whitney v. California*, 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 20 Wall. 590 (1875).

(*Id.*)

U-Haul sought and was denied review from the California Supreme Court on the basis of the following issue only: "[w]hat is the appropriate standard of review that a government body must meet to revoke a use permit under which a business has a vested property right?" (Petition for Review at 1.)

Thus, it sought review of the Appellate Court's determination regarding the appropriateness of the revocation remedy chosen by the City pursuant to California law *only* and not whether it was denied substantive due process under the Fourteenth

Amendment. Consequently, *the Appellate Court did not decide any federal question* let alone an "important federal question" compelling enough for this Court to grant certiorari.

B. The Important Federal Question U-Haul Claims Needs Resolution Was Settled By This Court In 1998

In an attempt to fall within the ambit of Rule 10(c), U-Haul characterizes the arena of substantive due process as "conflicted and in need of resolution and guidance from this Court." (Petition at 2.) In support of this statement, it cites one law review article written 3 years before this Court's ruling in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (*Id.* citing David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 Ga.L.Rev. 769, 770 (1995).)

Claiming that "some courts have gone astray" and "various standards of review have cropped up", U-Haul inexplicably cites to this Court's holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (*Id.* at 16.) However, as this Court stated in *Lewis*, "[o]ur cases dealing with abusive executive action have *repeatedly emphasized* that only the most egregious official conduct can be said to be arbitrary in the constitutional sense." (*County of Sacramento, supra,* at 846 citing *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992), and *Daniels v. Williams,* 474 U.S. 327, 332 (1986).) (emphasis added.) It further observed that "*for half a century now* we have spoken

of the cognizable level of executive abuse of power as that which shocks the conscience." (*Id.*) (emphasis added.) The Court concluded:

> Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.

(*Id.* at 848.)

Maintaining its criticism, U-Haul asserts that the standard employed in *County of Sacramento* is "largely undefined and therefore subjective" and inquires rhetorically, "what does it mean to 'shock the conscience'?" (Petition at 19.) U-Haul concludes that "the nation's courts should not continue to pick and choose among vague, inappropriate tests." (*Id.*)

However, this Court rejected the notion that substantive due process analysis must be fixed with rigid parameters in *County of Sacramento*. Rather, it stated very plainly:

> What we have said of due process in the procedural sense is just as true here:
>
> The phrase due process of law formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental

> fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

(*County of Sacramento, supra,* at 850.)

As the California Supreme Court noted in *Galland v. Clovis*, 24 Cal.4th 1003, 1030 (2001), cert. denied, 534 U.S. 826 (2001), *County of Sacramento* is this Court's "recent clarification of the meaning of substantive due process. . . ." Thus, it is not just one of many of the "nation's courts" which chose a "vague [and] inappropriate test[ ]." It is *this Court's* latest and definite expression of the "meaning of substantive due process." (*Id.*) Rule 10(c) was not intended to solicit repeated challenges to this Court's rulings because litigants believe they are somehow inadequate.

Illuminating the weakness of U-Haul's argument further is the fact that the two cases cited by it as evidence of the "myriad of tests" were both decided *prior* to *County of Sacramento*.[11] Thus, U-Haul implicitly recognizes that this Court has recently spoken on the appropriate test to determine substantive due process violations. However, as is true with every court it has appeared before so far, it simply does not like what it has heard. As a result, its claim that

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[11] See Petition at 16-20 citing *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991); and *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992).

there is confusion among the federal courts on this subject is as faulty as its claim that the Appellate Court here ruled on a federal question.

II. The City Did Not Deny U-Haul Substantive Due Process By Revoking Its CUP

In addition to the insufficiency of U-Haul's Petition under Rule 10 and 28 U.S.C. § 1257(a), its argument fails on the merits.

U-Haul argues that the City was constitutionally required to "pursue" or "adopt a less draconian remedy"[12] than revocation in light of the record before the City Council. This is tantamount to arguing that it is constitutionally entitled to continue operating its business no matter the severity or the frequency of its CUP violations as long as some remedy less draconian than revocation is available. In other words, under U-Haul's argument, it may continue operating in violation of its permit indefinitely since such remedies are *always available*. Rather, the salient question before a public agency is whether such alternative remedies are *adequate* to protect the public welfare. This is the essence of what local governments exist to do.

Not surprisingly, U-Haul cannot cite any law supporting its argument. Instead, it devotes the bulk of its Petition to a discussion of "multiple standards" applied by various state and federal courts across the

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[12] Petition at 23.

country (including standards relating to a Takings claim) which fail to "protect the property owner's constitutional right to substantive due process,"[13] none of which speak to the circumstances here except in the broadest of generalities.

The City does not quarrel that U-Haul is entitled to substantive due process, but no case stands for the proposition that a business is entitled to violate its CUP *ad infinitum* and, as long as there is some other "lesser" remedy available, the City is forever prohibited from revoking it.

To the contrary, relying on *County of Sacramento*, the California Supreme Court in *Galland* held, in the land use context, that:

> In determining whether a constitutional injury has taken place, we follow the path of the United States Supreme Court and other courts in asking whether government agents have deliberately committed obstructive and unlawful acts designed to interfere with . . . property rights.

(*Galland v. City of Clovis, supra,* at 1039-1040.)

U-Haul has not claimed that the City "deliberately committed obstructive and unlawful acts designed to interfere with [its] property rights" in this case.

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[13] Petition at 19.

A. Courts Have Distinguished Between Nuisance Abatement And Permit Revocation Actions

Because its argument cannot be sustained under the law applicable to revocation of CUPs, U-Haul tries to apply case law relating to nuisances and other distinct situations[14] to revocation of a conditional use permit. It cannot do so, however, since the fundamental natures of nuisance abatement and permit revocation are substantially different. In particular, where an entity has not received notice that a course of conduct is considered a public nuisance, and the government moves directly to an order to cease all operation, rather than first imposing conditions designed to eradicate the nuisance, it is appropriate

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[14] For example, U-Haul relies upon *U.S. v. Cohen*, 268 F. 420 (E.D. Mo. 1920); *Lawton v. Steele*, 152 U.S. 133 (1894); and *Korean Am. Legal Advocacy Found. v. City of L.A.*, 23 Cal.App.4th 376 (1994), which all involved nuisance abatement actions.

It also relies upon other inapposite cases: an inverse condemnation challenge to a wetlands restoration ordinance (*Presbytery of Seattle v. King County*, 114 Wash.2d 320 (1990)); a challenge to an ordinance regulating the operation of street cars in San Francisco (*City and County of San Francisco v. Market Street Railway Co.*, 98 F.2d 628 (1938)); a takings challenge to a rent cap on gas service station rent (*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)); a takings challenge to an ordinance prohibiting certain types of excavations (*Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)); and a due process challenge to a punitive damages award (*BMW v. Gore*, 517 U.S. 559 (1996)). (Petition at pp. 13-16 and 20-22.)

that courts have required a certain level of proportionality.

In contrast, a conditional use permit is conditional by its very nature and, upon receipt, the holder is immediately put on notice of the conduct required in order to comply with its conditions and, thereby, avoid revocation – as was the case here. Consequently, courts have properly recognized a distinction between actions involving nuisance abatement and permit revocations.

For example, the Appellate Court relied upon *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776 (1948), for its determination that a CUP may be properly revoked for failure to comply with its conditions. (Appendix A at 18a.) Specifically, the court in *Trans-Oceanic* held "[i]f the permittee . . . fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it." (*Trans-Oceanic, supra,* at 783 citing *Vincent Pet. Corp. v. Culver City*, 43 Cal.App.2d 511 (1941) [upheld revocation of permit to drill for oil for failure to comply with permit condition to commence operations within a time certain]; and *Godson v. Town of Surfside,* 150 Fla. 615 (1942) [upheld revocation of permit to construct hotel for failure to comply with representations made in permit application which became conditions of the permit].)

The Appellate Court further relied upon the holding in *San Marino v. Roman Catholic Archbishop,* 180 Cal.App.2d 657, 670 (1960), that "facts

constituting proof of an actual breach of conditions or of a clearly stated intention not to comply with the terms of a lawfully issued permit" constitutes a proper basis for revocation of a CUP. (Appendix A at 18a-19a.)

Many other California courts have also come to the same determination. "[W]ith respect to revocation of a conditional use permit, it is constitutionally sufficient if the administrative body is required to make its decision in accord with the general health, safety and welfare standard." (*Garavatti v. Fairfax Planning Com.*, 22 Cal.App.3d 145, 150 (1971) citing *Livingston Rock, etc. Co. v. County of L.A.*, 43 Cal.2d 121 (1954); *Cantrell v. Board of Supervisors*, 87 Cal.App.2d 471 (1948); and Cal. Zoning Practice (Cont. Ed. Bar 1969) § 7.73, p. 308).)

"When a permittee has acquired . . . a vested right [in a permit] it may be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted." (*O'Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151, 158 (1971) citing *Trans-Oceanic, supra,* at 783 and *Brougher v. Board of Public Works*, 205 Cal. 426, 433 (1928).) (See also *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal.App.4th 1519, 1530-1531 (1992) citing *O'Hagen, supra*, at 158; *Trans-Oceanic, supra*; *Upton v. Gray*, 269 Cal.App.2d 352 (1969); and *Community Development Com. v. City of Fort Bragg*, 204 Cal.App.3d 1124 (1988); and *Korean Am. Legal Advocacy Found. v. City of L.A.*, 23 Cal.App.4th 376, 392 (1994) citing *O'Hagen, supra*, at 158.)

"A CUP is conditional by definition, and the violation of conditions attached to its grant may lead to revocation." (*Malibu Mts. Rec. v. County of L.A.*, 67 Cal.App.4th 359, 367 (1998) citing 8 Cal. Real Estate Law & Practice (1998), Nonconforming Uses, § 262.05[3], p. 262-19.)

"[A] use may be operated in a manner that violates the conditions of approval or negatively impacts adjacent properties. Local agencies have certain tools at their disposal to deal with these problem uses, including revocation of the CUP." (Cal. Land Use Practice (Cont. Ed. Bar 2008) § 7.17, p. 318.)

Thus, U-Haul cites no applicable law for its proposition that the City must "demonstrate . . . evidence that . . . alternative remedies would be ineffective or unfeasible" before it may revoke a CUP for condition violations or else commit a substantive due process violation pursuant to the federal constitution. (Petition at 23.)

B. California Courts' Application Of Due Process Principles To Revocation of Conditional Use Permits

California courts have interpreted due process as requiring the following with regard to permit revocation: "In revoking a permit lawfully granted, due process requires that it act *only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation.*" (*San Marino, supra*, at 669 citing *Trans-Oceanic, supra,* at

783.) (original emphasis.) (See also *Angelopulos v. Bottorff,* 76 Cal.App. 621, 625 (1926); and *Cmty. Dev. Com. v. City of Fort Bragg*, 204 Cal.App.3d 1124, 1132 (1988).)

This standard is harmonious with the *Galland* ruling. As the court in *Galland* expressed:

> [O]ther cases both before and after *County of Sacramento* have affirmed in a variety of contexts, using a variety of verbal formulations, the principle that the arbitrary government conduct that triggers a substantive due process violation is not ordinary government error but conduct that is in some sense outrageous or egregious – a true abuse of power.

(*Galland, supra*, at 1032.)

In accordance with this authority, U-Haul was provided all the process that it was due. Not only were the conditions of its CUP clear and the potential for revocation set forth on the face of its permit, it was repeatedly notified over the course of a decade that its violations of the CUP could lead to revocation, it was properly notified of the City's proposed action and the action was considered at two public hearings before both the ZAB and the City Council. (Appendix A at 2a-6a.)

Reviewing the City Council's decision, the trial court properly applied the independent judgment standard pursuant to Code of Civil Procedure Section 1094.5(c). (Reporter's Transcript of January 31, 2008

at p. 2 lines 16-18.) It found, and the Appellate Court concurred, that the City's "findings . . . revoking and terminating Use Permit No. 7575 are supported by the weight of evidence." (Appendix B at 27a.)

Thus, U-Haul's due process rights were not violated since it was provided with notice of the City's proposed revocation, a public hearing regarding the proposed revocation and the City's revocation was based upon evidence substantially supporting it as determined both by the Superior and Appellate Courts. Nothing resembling "a true abuse of power" can be inferred, let alone proven, from the record in this case.

C. The Record Amply Demonstrates That The City Determined Other Remedies to U-Haul's Use Permit Violations Were Inadequate

Even if U-Haul's proposed standard was correct, the City engaged in the *very act* U-Haul asserts was required by due process, namely, consideration of the appropriate remedy for U-Haul's uncontroverted and long-term violations. Thus, U-Haul's real complaint is not that the City failed to *consider* other remedies, but that *upon consideration* of U-Haul's steadfast violation of the law regardless of continual promises to conform, the City *rejected* other remedies as inadequate. Hence U-Haul's protests that the City did not "*pursue* alternative remedies" and "it was certainly feasible for the City *to adopt* a less

draconian remedy." (Petition at 23.) (emphasis added.)

Indeed, *the very fact* that City staff initially recommended further conditioning U-Haul's CUP to the ZAB demonstrates that the City *considered* other remedies. U-Haul cites the ZAB's transcript as evidence of its alleged due process violation. (Petition at 23 citing AR at 146.) However, rather than support U-Haul's position, this 19 page transcript reveals an administrative body struggling to comprehend U-Haul's resolute determination to flout the City's laws in the face of potential CUP revocation, to the point that it did not even bother to appear at the ZAB's hearing. (AR 133-152.) Specifically, it makes evident the Board's consideration of and disagreement with the staff recommendation, based upon U-Haul's tenacious behavior. Boardmember Allen observes:

> Well, I think the one neighbor who spoke pretty much made the case I was going to make. I don't think there's anything in U-Haul's performance or actions to suggest that our simply suggesting to Council that they should restate the terms of the Use Permit will have any effect on them. So I'm going to move that ZAB recommend to Council that U-Haul's Use Permit be revoked.
>
> It is clear U-Haul doesn't get it. They don't get what they've done to the neighborhood and they don't even get it enough to come appear at this hearing.

> My concern is that merely restating . . . what the Use Permit says, which to me is unambiguous, they haven't followed it for all these years, what is the difference now? I think the only action is to simply revoke the permit.

(AR 139, 140 and 142.)

Following this discussion, Boardmember Doran advocates for a different approach:

> Well, from my point of view, if a situation could be enforced, that U-Haul could continue to function, tha[n] I personally think that is of benefit to the City. That a U-Haul facility, in that location, run according to the permit that they've been given to me would be the ideal situation.
>
> So, I've only suggested . . . that I would be comfortable with supporting the staff recommendation and only adding . . . that they have 30 days to conform. . . . That is something they could start tomorrow, if they were serious.
>
> [T]hat our recommendation be . . . empower the City to monitor what is going on, and [if] there are any violations after 30 days, their permit [i]s revoked. [W]e'll give you 30 more days to get your act together.

(AR 143-144.)

Considering this, Boardmember Shumer states:

> There's been a history of being warned, being cited, being told. Maybe temporary compliance. I'm afraid that if we advise the City Council to give them 30 days, we really start the whole enforcement-compliance all over. So that we're going to have to [be] the police and whomever visit[s] the site on a regular basis for the next umpteen times. I think they have had more than 30 days to recognize that the City has a problem with their behavior.

(AR 144-145.)

After reflecting on Boardmember Allen's concerns regarding the City's Hearing Officer's dismissal of part of a citation issued to U-Haul, Boardmember Judd states:

> I just want to add [that] the hearing officer upheld part of the charge . . . that had to do with parking vehicles offsite which I think, given how long it's gone on and how the U-Haul folks have responded, prior to citations and how much City time and money has been invested, would be enough to support [the revocation] motion in and of itself.

(AR 147-148.)

Next, Chair Tiedemann states:

> The fact [that] they didn't even send a representative here tonight, given the number of citations that have been issued by the City,

> leads me to the conclusion that they really don't deserve one last chance. . . .

(AR 149.)

Speaking to the 30 day proposal, Boardmember Alvarez-Cohen states:

> I appreciate your attempt to try to save this resource for Berkeley. But it's clear that they have a patter[n] of behavior that [is not] compatible with that location. So I don't think we should give them another chance.

(AR 150.)

Consequently, the ZAB discussion very clearly represents the considerable thought it gave to diverting from the staff's recommendation. What's more, it undertook this deliberation *absent any input* from U-Haul itself to the City's proposed action. Record of this deliberation was provided to the City Council for its determination and it specifically noted that it "carefully considered" it in adopting Resolution Number 63,842. (City's Appendix A at 10.)

Moreover, rather than "refuse" to consider alternatives as U-Haul claims, the Berkeley City Council expressed its *regret* in being forced by U-Haul's conduct to take an action they did not wish to.

> Councilmember Moore: [I am] very disappointed that U-Haul waited until the very last moment on the very last day to contact me when they could have done this months

> ago or they could have done this with the community months ago.

(AR 405.)

> Councilmember Capitelli: I find this an incredibly depressing situation because I think the rental of these pickup trucks is a real resource and asset for the community. But in reading the public record, it's just absolutely stunning. [I]t's just amazing that one could ignore the situation for so long. And I know there are good jobs involved down there that probably pay well. And I'm sorry to support the motion . . .

(AR 406.)

Based upon these unhappy circumstances, the Council voted unanimously to adopt a resolution which sets forth in great detail all bases for revoking U-Haul's CUP. (City's Appendix A.) Nonetheless, U-Haul characterizes the City's careful contemplation of its action as equating to "no meaningful discussion." (Petition at 23.)

Thus, it is evident that U-Haul's complaint about the City process – one it chose not to engage in – is no more than a complaint about the result. The City provided U-Haul with many opportunities to act responsibly over the course of a decade. Rather than act in compliance, U-Haul has persistently refused to adhere to its conditions. The City had no choice but to

revoke its CUP in the face of such blatant disregard for the law.

CONCLUSION

Although the City provided U-Haul with a decade's worth of opportunity to comply with its CUP, and the impact of its non-compliance on the surrounding community was clearly communicated to it, it unwaveringly chose to continue, and thereby profit from, its illegal expansion into the neighborhood. On the eve of revocation, it admitted its failures and pledged to *finally* conform, now that the City had its attention. The City rightly deemed these belated efforts lacking in light of the record before it and revoked its CUP.

Rather than comply with this determination, U-Haul sued the City. This determination was then reviewed by the trial court pursuant to the independent judgment standard and was determined to be supported by the weight of evidence in the record. Far from the "death penalty for a business"[15] it claims it suffered from this ruling, and despite its failure to obtain a stay of this ruling, it continued to operate at the Berkeley location and the City was forced to file a separate action to enjoin its operations which the

[15] Petition at 22.

court preliminarily granted. (Alameda County Superior Court Case No. RG0838856.)

Before the Appellate Court, U-Haul raised new due process arguments claiming it had not been provided a fair hearing before the City Council, that it was improperly denied oral argument on the writ and that the trial judge was biased against it. Although the Appellate Court ruled that these arguments had been waived, it rejected each one on a substantive basis as well and found that the trial court's denial of its writ was based upon substantial evidence.

U-Haul continued its challenge in the California Supreme Court arguing that the Appellate Court also erred because it did not apply U-Haul's "heightened due process standard" which apparently requires Appellate Courts to examine and measure "all reasonable alternatives" to revocation, whether or not contained in the Administrative Record, in order to review a trial court's decision upholding a CUP revocation for a failure to comply with its conditions. The California Supreme Court denied U-Haul's petition for review.

Here, U-Haul resorts to interpolating federal case law into a quote by the Appellate Court in order to attempt to manufacture a federal question. It then claims this Court must grant certiorari to resolve an issue that it *recently resolved* and cites to this Court's determination as just one of "the nation's courts'" "myriad of tests." U-Haul further disingenuously alleges to seek redress for the City's failure to

"consider" alternative remedies to "*a complete closure of its truck business.*" (Petition at 24.) (emphasis added.) However, what it terms "consideration" in reality is "adopt[ion]" since the record overwhelmingly demonstrates the City's considered determination. (*Id.* at 23.)

For all the foregoing reasons, the City respectfully prays that this Court deny U-Haul's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A – BERKELEY CITY COUNCIL

RESOLUTION NO. 63,842-N.S.;
DATED OCTOBER 9, 2007

(Bate Stamp Nos. 000514 – 000521
of the Administrative Record, Volume Two)

RESOLUTION NO. 63,842–N.S.

REVOKING AND TERMINATING USE PERMIT NO. 7575 ISSUED TO U-HAUL COMPANY, LOCATED AT 2100 SAN PABLO AVENUE, FOR VIOLATING THE TERMS OF THE USE PERMIT

WHEREAS, the U-Haul Company (hereafter "U-Haul") is a truck and trailer rental business located at 2100 San Pablo Avenue, in Berkeley, California, in the West Berkeley Commercial District of South Berkeley; and

WHEREAS, U-Haul has been in operation since July 1975; and

WHEREAS, U-Haul International, Inc. in Phoenix Arizona owns the property and Jeff Singleton, U-Haul Marketing Company President, and U-Haul Company of West Sacramento operate the business; and

WHEREAS, in May 1975, U-Haul submitted a use permit application and site plan that stated that there would be approximately twenty trucks and thirty trailers stored on the site, the hours of operation would be 8:00 a.m. to 7:00 p.m. and there would be four off-street parking spots on the U-Haul lot; and

WHEREAS, in June 1975, the Zoning Adjustments Board (hereafter "Board") granted U-Haul Use Permit No. 775 based on its application that the use will include approximately twenty trucks and thirty trailers; and

WHEREAS, in September 1975 the City conducted an inspection and determined that U-Haul had constructed a building partially in the right of way. The City ordered U-Haul to submit an application for a revocable encroachment permit, which was granted by City Council Resolution No. 47,702 N.S.; and

WHEREAS, since 1997 U-Haul has repeatedly violated the conditions of Use Permit No. 7575 by greatly exceeding the number of trucks allowed on the property and using the public right of way to store additional vehicles; and

WHEREAS, in September 1997, the Zoning Compliance Officer issued U-Haul a *First Notice and Order to Correct*, in which U-Haul was specially warned that Use Permit No. 7575 allowed staging on the property only and that it was in violation of eight design review conditions placed on Use Permit No.7575. In October 1997, U-Haul submitted a written response to the *First Notice* stating that (a) incoming trucks and trailers would be referred to the new Emeryville dealership when the Berkeley location is full; (b) premiums would be increased on one-way rentals; and (c) customers renting from Berkeley would be referred to other locations for returns; and

WHEREAS, on May 17, 2000, the City received a complaint from a neighborhood resident that U-Haul was using Addison Street, Tenth Street and Allston Way to store its vans. The resident complained to U-Haul and was told by U-Haul it had no room on its lot to store all the vehicles; and

WHEREAS, on June 14, 2000, in response to the May 17, 2000 citizen complaint, Code Enforcement Officer Maurice Norrise contacted U-Haul Assistant Manager Randy Hessler regarding the complaint and on June 16, 2000 issued U-Haul a *Courtesy Follow Up Notice* notifying U-Haul that it was unlawfully using the public right of way to store vehicles; and

WHEREAS, on August 21, 2000 the Code Enforcement Officer issued a criminal citation to Randy Hessler for illegally parking U-Haul trucks in the public right of way; and

WHEREAS, on September 14, 2000, Code Enforcement received a letter from Jim Buell, U-Haul Marketing Company President, stating that U-Haul would comply with its use permit in part, that all trucks parked by customers in the public right of way after hours would be removed by 10:00 a.m. the next day, and that U-Haul would apply for a variance to reduce the number of trailers and increase the number of trucks. However, U-Haul never filed any such application; and

WHEREAS, on August 23, 2004, in response to community complaints, Code Enforcement Officer Roy Phelps contacted Jeff Singleton, the new U-Haul Marketing Company President, regarding U-Haul's violating the conditions of the use permit by parking its trucks in the public right of way; and

WHEREAS, on September 15, 2004, the Code Enforcement Officer Roy Phelps issued a *Notice of Violation* to U-Haul manager Emerson Payumo

because U-Haul continued to park its trucks in the public right of way despite prior warnings; and

WHEREAS, in May 2006, neighbors again complained that U-Haul was parking trucks on the street and blocking driveways. During the period from May 2006 and June 2006, Code Enforcement Officer Roy Phelps monitored U-Haul activity and warned U-Haul Manager Mike Neville that he would be cited if U-Haul continued to park trucks in the public right of way; and

WHEREAS, on June 13, 2006, after repeated inspections and warnings, the Code Enforcement Officer issued a $500 administrative citation (No. 0023) to U-Haul Manager Mike Neville for parking trucks on the public right of way. U-Haul did not appeal administrative citation No. 0023 and the $500 penalty was paid on August 31, 2006; and

WHEREAS, on August 23, 2006, Code Enforcement staff met with Jeff Singleton regarding U-Haul's unlawful practice of parking its trucks on the public right of way, and during this meeting staff pointed out to Mr. Singleton that the site plan posted in U-Haul's office was in violation of Use Permit No. 7575 because it showed U-Haul storing fifty trucks on the lot; and

WHEREAS, at the August 23, 2006 meeting with Mr. Singleton, Code Enforcement staff gave Mr. Singleton a 30-day moratorium on further enforcement action and advised Mr. Singleton to do all the following: (1) submit an application to modify the current use

permit; (2) schedule a meeting with the surrounding residential and commercial neighbors to discuss current and previous community concerns; (3) do not park U-Haul trucks on the public right of way; and (4) reduce the number of trucks on the lot to 20 trucks; and

WHEREAS, on September 21, 2006, Code Enforcement delivered to U-Haul Field Relief Manager Adam Craig a written notice for Mike Neville and Jeff Singleton that advised the City's 30-day moratorium on enforcement would expire on September 23, 2006, warned U-Haul that it must reduce the number of trucks it had on the lot (fifty-one at that time) to no more than twenty trucks, and requested that Mr. Neville or Mr. Singleton contact the Planning Department regarding their use permit violations; and

WHEREAS, on October 5, 2006, Code Enforcement Supervisor Gregory Daniel issued a citation warning letter to Mike Neville and Jeff Singleton in which he chronicled U-Haul's repeated violations of Use Permit No. 7575 and warned that because of U-Haul's history of non-compliance with the use permit that U-Haul would be cited for all violations to the full extent allowed under law; and

WHEREAS, on November 16, 2006, U-Haul submitted by facsimile an application to modify Use Permit No. 7575 which was incomplete as it did not include the requisite fees, applicant statement, site photographs, vicinity map, site plan or the Zoning Use questionnaire and it did not comply with

Planning Department procedures because facsimile applications are not accepted. On December 13, 2006, staff issued U-Haul a letter advising it that the modification application was incomplete and giving it ten days to file a completed application. U-Haul never completed the application; and

WHEREAS, on February 20, 2007, Peter Onken of U-Haul Company of West Sacramento, submitted another application to modify Use Permit No. 7575. Staff again determined that the application was incomplete in that it failed to address at least fourteen substantive issues regarding U-Haul's operation. On March 16, 2007 staff notified U-Haul its application was incomplete. U-Haul never responded nor submitted a revised application; and

WHEREAS, Code Enforcement has issued U-Haul nine separate citations between June 13, 2004 and February 13, 2007 for violations of Berkeley Municipal Code (BMC) 23B.56.010A, which prohibits any use or activity not proposed in the use application and BMC 23B.56.020A.8, which requires a modification for any change that expands, intensifies or substantially changes the use; and

WHEREAS, on August 21, 2006 Code Enforcement issued U-Haul Administrative Citation No. 0046 for violation of BMC Section 23B.56.020.A.8 for parking thirty-two (32) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total citation of $6400. The citation was upheld on appeal to the City's administrative hearing officer, but has

been appealed by U-Haul to the Alameda County Superior Court; and

WHEREAS, on September 25, 2006, Code Enforcement issued U-Haul Administrative Citation No. 0025 for violation of BMC Section 23B.56.020.A.8 for parking twenty-three (23) excess trucks on the U-Haul lot and imposed a penalty of $100 for each excess truck for a total citation of $2,300. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 2, 2006, Code Enforcement issued U-Haul Administrative Citation Nos. 2390 and 0049 for violations of BMC Section 23B.56.020.A.8. Citation No. 2390 was issued to U-Haul for parking two (2) U-Haul trucks in the public right of way. The penalty imposed was $300 for each truck parked in the right of way for a total penalty of $600. Citation No. 0049 was issued to U-Haul for the twenty (20) excess trucks it had parked on the U-Haul lot. The citation imposed a $200 per truck penalty for each truck in excess of the 20 allowed under the use permit, for a total penalty of $4,000. U-Haul failed to appeal either citation and the penalties remain outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement issued Administrative Citation No. 2391 for violations of BMC Sections 23B.56.010.A, 23B. 56.020.A.8, 23B.56.030, and 23B.56.040 for parking 38 excess trucks on the U-Haul lot. The citation imposed a $100 per truck penalty for each truck in excess of the 20

allowed under the use permit, for a total penalty of $15,200. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on October 11, 2006, Code Enforcement also issued Administrative Citation No. 2392 for violation of BMC Section 23B.56.020.A.8 for parking two (2) U-Haul trucks in the public right of way. The penalty was $200 per truck for a total penalty of $400. U-Haul failed to appeal the citation and the penalty remains outstanding; and

WHEREAS, on November 3, 2006 Code Enforcement issued Administrative Citation No. 2651 for parking twenty-seven (27) excess trucks on the U-Haul parking lot. The citation imposed a penalty of $200 for each truck in excess of the 20 allowed under the use permit, for a total penalty of $21,600; and

WHEREAS, on November 15, 2006, U-Haul Marketing President Jeff Singleton filed an appeal of Administrative Citations No. 0046 and 2651. U-Haul argued that citation No. 0046 should be dismissed because the City could not regulate U-Haul's use of the public right of way. U-Haul also argued that citation No. 2651 should be dismissed because Use Permit No. 7575 was vague and unenforceable because the application stated "approximately 20 rental trucks and 30 rental trailers" would be stored on the U-Haul lot. The hearing officer upheld citation No. 0046 but overturned citation No. 2651 on the ground that she found the use permit to be ambiguous and insufficiently detailed; and

WHEREAS, on February 13, 2007, Code Enforcement issued U-Haul Manager Mike Neville Administrative Citation No. 2394 for illegal dumping, under BMC 12.40.080. The penalty was $1,500, which was not appealed by U-Haul and was paid on March 15, 2007; and

WHEREAS, U-Haul appealed to the Alameda County Superior Court the City's Administrative Hearing Officer's decision on citation No. 0046 and has argued that it is not violating Use Permit No. 7575 by expanding its business beyond the property line to the public right of way. Trial is set on this matter for October 15, 2007; and

WHEREAS, on June 28, 2007, based upon U-Haul's numerous violations of Use Permit No. 7575, the Zoning Adjustments Board held a duly noticed meeting as required by BMC Section 23B.60.020 to determine whether to recommend to the City Council whether U-Haul is in violation of Use Permit No. 7575 and if so, the appropriate remedy; and

WHEREAS, no representative of U-Haul attended the Zoning Adjustment Board's hearing, nor did U-Haul submit any written statement; and

WHEREAS, upon conclusion of the hearing the Zoning Adjustments Board adopted Resolution No. 07-02 and recommended that the City Council revoke Use Permit No. 7575; and

WHEREAS, on September 18, 2007, the City Council held a duly noticed public hearing to consider the

recommendation of the Zoning Adjustment Board and any other evidence that the public or concerned parties wished to present; and

WHEREAS, on July 25, 2007, the City Clerk sent to Mike Neville, U-Haul Company Berkeley, Tom Tollison, U-Haul International, Inc., Jeff Singleton, President, U-Haul Marketing Co., and Damien P. Lillis, U-Haul's legal counsel, a letter notifying them of the public hearing, as required by law, and of the procedure that would be followed at the September 18 hearing; and

WHEREAS, Jeremy Frank, U-Haul District Vice President, attended the Council hearing and submitted additional documents. Mr. Frank did not dispute U-Haul's violations of Use Permit No. 7575, and instead specifically acknowledged that the City could regulate U-Haul's use of the public right of way and apologized for U-Haul's violations of Use Permit No. 7575; and

WHEREAS, the City Council has carefully considered all of the evidence before it, including the June 28, 2007 staff report to the Zoning Adjustments Board, the transcript of the June 28, 2007 Zoning Adjustment Board, subsequent written communications, the staff report prepared for the City Council meeting on September 18, 2007 and the testimony and additional documents submitted at the public hearing on September 18, 2007; and

WHEREAS, no evidence was submitted at the Council hearing refuting Code Enforcement's numerous

citations and notices to U-Haul of its violations of Use Permit No. 7575 by parking in excess of 20 trucks on the U-Haul lot and parking U-Haul trucks in the public right of way; and

WHEREAS, on October 8, 2007, after the Council had closed the public hearing, Marco Gonzalez, U-Haul's newly retained counsel submitted a letter with additional documents to Council, arguing that Council should not revoke U-Haul's use permit because 1) it would be an abuse of the Council's discretion; 2) U-Haul is not violating any conditions of the use permit since the City's administrative hearing officer has determined that the use permit was vague as to how many trucks could be parked on the lot and the Council is bound by that decision; 3) U-Haul has not substantially expanded or changed its character; 4) U-Haul is not operating in violation of its use permit; and 5) the use permit conditions are unenforceable under the doctrine of estoppel; and

WHEREAS, not only is Mr. Gonzalez' October 8th letter untimely, even it had been timely, his arguments lack any merit. Significantly, the administrative hearing officer is only empowered to rule on the citation that was before her. In contrast, the Council has the power under the Zoning Ordinance (BMC 23B.56.030) to determine the conditions of the use permit and whether any have been violated. Further, the record before the Council was far more expansive than that presented to the administrative hearing officer. The fact that U-Haul paid taxes is irrelevant to the Council's determination that it

violated the conditions of the use permit. And, there can be no estoppel as the City has never made any representations to U-Haul that its conduct was lawful and has in fact for numerous years placed U-Haul on notice that it is in violation of the conditions of its use permit; and

WHEREAS, the City Council has evaluated the probative value of all of the above evidence, drawn reasonable inferences there from, and considered the credibility of the various witnesses, based on both their observed demeanor at the public hearing before the City Council and the substance of their testimony (e.g., whether it has been consistent over time, is internally consistent, is illogical, etc.); and

WHEREAS, based on its review of the evidence, the City Council finds as follows:

1. The proceedings before the Zoning Adjustment Board and City Council were conducted under the procedures provided by law.

2. The following are conditions of Use Permit No. 7575:

    a. No more than 20 trucks and 30 trailers are allowed on the lot at any time.

    b. No vehicles or equipment shall be staged, stored, repaired or maintained in the public right of way at anytime.

    c. The hours of operation are 8:00 a.m. to 7:00 p.m. daily.

d. Four off-street parking spaces shall be provided for customers at all times.

e. U-Haul shall comply with all Use Permit No. 7575 Design Review Conditions no later than 30 days from issuance of the Council's decision.

3. The permitted use has been substantially expanded or changed in character beyond that set forth in Use Permit No. 7575.

4. The U-Haul business at 2100 San Pablo is and has been operating in violation of Use Permit No. 7575.

5. Since 1997, U-Haul has been placed on notice that parking more than 20 trucks and 30 trailers on the U-Haul lot and using the public right of way to store U-Haul trucks violates Use Permit No. 7575.

6. Despite being advised by Code Enforcement how to apply for a modification of its Use Permit, U-Haul has never followed through and submitted a completed application for modification of Use Permit No. 7575.

7. Code Enforcement issued U-Haul nine citations for violation of Use Permit No. 7575 between the period from June 13, 2004 through February 13, 2007, for total penalties of $52,900.

8. Despite Code Enforcement's attempts during the last ten years to get U-Haul to conduct its business in compliance with Use Permit No. 7575, U-Haul has failed and continues to

conduct its business in violation of Use Permit No. 7575.

9. U-Haul's apology at the September 18, 2007 public hearing does not negate its serious violations of Use Permit No. 7575 and is insufficient in light of the evidence which shows U-Haul's longstanding failure to comply with the use permit.

10. Marco Gonzalez' October 8th letter on behalf of U-Haul is untimely since Council closed the public hearing and the record on September 18, 2007, and for that reason it is not admitted into the record.

11. Even if Mr. Gonzalez' October 8th letter had been submitted timely, the Council finds that pursuant to BMC 23B.56.030, the representations made by U-Haul in its use permit application and the lot drawings were conditions of the use permit that U-Haul violated. As noted previously, in 2000, U-Haul conceded it was subject to these limitations and in 2006 paid a $500 penalty, thereby conceding that this was a condition of the use permit.

12. The Council has independent authority to interpret the Zoning Ordinance and revoke U-Haul's use permit for violations of the use permit pursuant to BMC 23B.060.010 and 23B.060.020, based upon a far more extensive record and its legislative history in interpreting the Zoning Ordinance.

13. The City's administrative hearing officer's April 6, 2007 determination addressed only

the administrative citation and she did not have before her the full administrative record the Council considered at its September 18, 2007 public hearing or any information about the legislative history of the Zoning Ordinance in this respect.

14. The City has made no representations to U-Haul that its conduct was lawful and has for many years specifically placed U-Haul on notice that its conduct was in violation of the use permit.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that U-Haul Company, located at 2100 San Pablo Avenue is hereby declared to be in violation of Use Permit No. 7575 under Berkeley Municipal Code 23B.60.020, and said Use Permit is hereby revoked and its operations are ordered to cease forthwith.

The foregoing Resolution was adopted by the Berkeley City Council on October 9, 2007 by the following vote:

Ayes: Anderson, Capitelli, Maio, Moore, Olds, Spring, Worthington, Wozniak and Bates.

Noes: None.

Absent: None.

/s/ _____
Tom Bates, Mayor

Attest: /s/ _____
Pamyla Means, MMC, City Clerk